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Supreme Court of the United States

October Term, 1952

No. 576

UNITED STATES OF AMERICA, *ex rel.* NEREO DOLENZ,
Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director, New York District Immigration and Naturalization Service,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

The government seeks to defeat a review of this case. It is urged that "the importance of review by this Court in the case of the statutory provisions here involved is substantially eliminated by the supplanting of that provision by the new provision effective December 24, 1952, * * * which unmistakably leaves the matter to the discretion of the Attorney General". (Page 19, respondent's brief. See context 66 Stat. 281-282 pp. 15-16, respondent's brief.)

The government thus seeks to escape the impact of the Administrative Procedure Act, 5 U. S. C. 1001 *et seq.* which would, among other things, have nullified the decision made in this administrative deportation hearing (1) for having permitted an investigator to hear the case and recommend the decision (Title 5 U. S. C. 1004 (c)); (2) for having decided the case on material dehors the record as prohibited by Title 5 U. S. C. 1006 (c); and (3) for having made a decision without including "a statement of (1)

findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record" (5 U. S. C. 1007 (b)).

We assume that the government bases its contention upon 5 U. S. C. 1009, which precludes judicial review where "agency action is by law committed to agency discretion".

But Congress did not grant, under the new law, the authority to the Attorney General to resolve in his discretion, the issues of physical persecution. A contrary legislative intent was clearly enunciated.

As pointed out at page 15 of respondent's brief: Congress at all times adhered to the proposition that "the bill continues the provision in existing law to the effect that no alien shall be deported to any country in which the Attorney General finds that he would be subjected to physical persecution".

It is difficult to follow the reasoning of the government. It stands admitted that the legislative history of this particular section evidences that while at one point a proposed draft stated that the Attorney General could make a finding as to physical persecution "in his discretion" (H. Rep. 1365, 82d Cong., 2d Sess., p. 191), the final bill deleted from the new law the words "in his discretion". For the government to now argue that the present law authorizes the Attorney General "in his discretion" to determine the question of physical persecution, is to lose sight of the plain meaning of words. If Congress had meant to vest discretionary power in the Attorney General, the words "in his discretion" could have been retained in the final law. That Congress deleted these words evidences the tenuous nature of the respondent's argument. Before the enactment of this law, Senator McCarran, whose name the bill in part bears, said:

> "(88) It is charged that the McCarran-Walter bill authorizes arbitrary deportation by the Attor-

> ney General. The truth is that the bill provides a detailed and comprehensive procedure to be applicable in deportation cases which provides that every decision in deportation cases must be based on reasonable, substantial and probative evidence. The bill further preserved the right of judicial review of the decision of the Attorney General in deportation cases under the procedure prescribed."

(Page "6" of "Factual Resume" from the Office of Pat McCarran (D-Nev.), McCarran-Walter Omnibus Immigration and Nationality Bill (S. 2550) v. Humphrey-Lehman Substitute.)

The Conference Report, Statement of the Managers on the Part of the House (U. S. Code, Cong. Service, 82nd Cong., 2nd Sess. p. 2854) had this to say:

> "In order to further clarify legislative intentions, the conferees have agreed to express in their respective statements certain of their unanimously held opinions, trusting that such statements will facilitate the task of the executive agencies charged with the administration of the proposed law. * * *
>
> "(2) Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings."

We respectively submit that from the foregoing, petitioner's attack upon the old law is equally applicable to the new law.

Even if we assume that a judicial review of the question of physical persecution were barred under the new law by Section 1009, the denial of the right of a proper hearing and a proper decision in accordance with the Administrative Procedure Act, would constitute a denial of due process.

And in the final analysis, new law or old law—if discretion be abused, it is always a matter of judicial review.

II

The government for the first time now admits that in 36 cases of this kind, the Commissioner of Immigration has made negative findings similar to the one made here. We need not labor the point that if the burden of proving a negative is to be placed upon a person claiming physical persecution, the purpose of both the old and new laws is emasculated. The danger of permitting the head of an administrative agency to evade the making of an affirmative finding by reliance on negative findings is to cloak such administrators with a power so great as to destroy democratic process.

The attempt to arrogate plenary and summary powers to themselves by agency heads and the resultant chaos which might ensue is best illustrated by comparison of the action of the Commissioner in this case with that of the Federal Security Administrator in *Atlas Powder Company* v. *Ewing* (not reported. Petition for certiorari is now pending in this Court #610, October Term, 1952). There it was found "the results of the pharmacological tests reported do not warrant the conclusion that there is no likelihood of injury from bread containing these substances". On the strength of this negative finding, the petitioner's product in that case was eliminated from a market which it had enjoyed for years.

Thus two widely divergent Administrative agencies make use of the negative finding. To allow this state of illegality to remain unchallenged is to set the pattern for all other agencies. Lacking the courage to find affirmatively, the negative finding is utilized and the design for the abuse of discretion is fixed.

III

The respondent's reliance on *Carlson* v. *Landon,* 342 U. S. 524, is without basis. We do not believe that at this time we should burden the Court with a discussion setting forth our reasons for urging that the *Carlson* case is not applicable to case at bar. We now only state that while the question of bail may be collateral to a finding of deportability, the question of whether an alien may be ordered deported to a country other than the one which will accept him and which he chooses or to a country where it stands proven the alien will be physically persecuted goes to the very heart of a determination of deportability.

IV

The acting Solicitor General is to be commended upon his display of candor and forthrightness. This petitioner and an assortment of 36 aliens now know how the orders were formulated which will dispatch them to liquidation, torture and brutality. Though their bodies bleed and their lives be snuffed out, they can now face their ordeal consoled by the knowledge that the Commissioner of Immigration found against their plea of physical persecution on "information" the "sources (of which) cannot be disclosed" (p. 17, respondent's brief).

This shocking disclosure of star chamber trial is made more stark by the attempt of the government to justify this unAmerican procedure on the grounds that there are "only 36 cases of this kind". Must the blood of our deportees

pour into the oceans and stain our shores before we shall be made to realize that the adoption of totalitarian secret police methods will cause our own destruction?

No claim is made that the national security is threatened by the presence of this petitioner or the other 35 deportees. However, it is insinuated. In *Knauff* v. *Shaughnessy,* 338 U. S. 537, the Commissioner of Immigration charged that Mrs. Knauff was excluded as a security risk on information of a confidential nature, a disclosure of the sources of which would endanger the national security. Counsel here represented Mrs. Knauff in her administrative proceeding. After the decision by this Court, a hearing was granted to her by the then Attorney-General. We have experienced the effect of light being cast into the secret files of the service. The weight which should be given the "information" upon which the Immigration Service bases its decisions in these so-called security cases is best illustrated by a reading of the decision of the Board of Immigration Appeals in ordering the admission of Mrs. Knauff to this country (Administrative File #A-6937471). The veil of secrecy in the *Knauff* case when cast aside revealed "information" consisting wholly of hearsay.

The problem of the *Knauff* case seems trivial when compared with those of the 36 now facing "physical persecution". If they were deported and, upon arrival in their destined country, immediately liquidated, their trials and tribulation would be over. But our law recognizes that brutal forces exist in the world today and so the choice of the words "physical persecution" used in the statute. It is not that the lives of these men will be taken, but what their minds and bodies will endure until they will be dispatched. The choice of ruling against these 36 people rather than disclose secret information may be "obvious" to the

Solicitor General. It is obscure to any American who believes in the democratic traditions of our great country.

The petition for certiorari should be granted.

March 13, 1953.

Respectfully submitted,

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